Filed 6/6/07 P. v. Perez CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSÉ SEDANO PÉREZ,

Defendant and Appellant.

F049287

(Super. Ct. No. F05904216-9)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Hilary A. Chittick, Judge.

Grace Lidia Suarez, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer and Jerry Brown, Attorneys General, Mary Jo Graves, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, J. Robert Jibson and Janine R. Busch, Deputy Attorneys General, for Plaintiff and Respondent.

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After 15 years of marriage and three children, Yadira Carranza and José Sedano Pérez separated. One day after Carranza dropped off one of the children at school, Pérez accused her of having an affair with a man who was with him and whom Carranza

recognized as someone from an apartment near the one where she and the children lived. She lowered her car window, she and the other man told Pérez they had never spoken to each other, and the other man left. Suddenly Pérez reached into the car, unlocked the door, got inside, and told her he wanted "to fix things," but as she drove home with another one of the children in the car she told him she did not want to live with him anymore. As she opened the door to her apartment, he pushed her inside and started arguing with her and hitting her.

Testifying in his own defense, Pérez admitted that he met Carranza at the school and that he talked with her inside the apartment but not that he hit her. On cross-examination, he testified that he asked the detective who interviewed him to investigate a man in a blue car whom he considered a suspect. On rebuttal, the detective testified Pérez never mentioned a man in a blue car to her. Pérez's other defense witness, his niece, testified that shortly before she picked up one of the children at the apartment she talked with Carranza on the phone, that after arriving at the apartment she saw Pérez at the door and heard Carranza say something in a normal voice about taking care of the child, and that she noticed nothing strange.

An information charged Pérez with corporal injury on the parent of his child (corporal injury) with a corporal injury prior (§ 273.5, subds. (a), (e)(1)[1]), criminal threats (§ 422), and disobedience of a court order (§ 166, subd. (a)(4)) and alleged a prison term prior for possession of a controlled substance (§ 667.5, subd. (b))**.** Outside the presence of the jury, he admitted both priors. The jury found him guilty as charged. The court imposed an aggregate 6-year sentence (a 5-year aggravated term for corporal injury with a corporal injury prior**,** a 1-year consecutive term for the prison term prior, a concurrent 3-year aggravated term for criminal threats, and a concurrent 6-month term

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1 All statutory references are to the Penal Code except where otherwise noted.

for disobedience of a court order). (§§ 18, 19, 166, subd. (a)(4), 273.5, subd. (a), 422, 667.5, subd. (b).) On appeal, he challenges the constitutionality of the court's admission of and instruction on evidence of his corporal injury prior and challenges the constitutionality of the court's selection of aggravated terms without jury findings on circumstances in aggravation. We will remand for a new sentencing hearing but otherwise will affirm the judgment.

DISCUSSION

1. Evidence Code Section 1109

In *People v. Falsetta* (1999) 21 Cal.4th 903 (*Falsetta*), the California Supreme Court rejected constitutional challenges to the admission under Evidence Code section 1108 of evidence of other sexual offenses in a sexual offense prosecution. (*Falsetta,* at p. 916.) By analogy to *Falsetta,* Court of Appeal cases consistently have rejected later constitutional challenges to the admission under Evidence Code section 1109 of evidence of other domestic violence in a domestic violence prosecution. (See, e.g., *People v. Price* (2004) 120 Cal.App.4th 224, 240; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1309-1313.) Counsel cite, and we are aware of, no case to the contrary.

Pérez argues that the California Supreme Court has not yet ruled on the constitutionality of Evidence Code section 1109, that the United States Supreme Court has not yet ruled on the constitutional propriety of allowing a criminal conviction to rest in part on evidence of propensity (*Old Chief v. United States* (1997) 519 U.S. 172, 181, quoting *Michelson v. United States* (1948) 335 U.S. 469, 475-476; *Estelle v. McGuire* (1991) 502 U.S. 62, 75, fn. 5), that the Ninth Circuit has found the inference of criminal propensity from evidence of other crimes violative of due process (*Garceau v. Woodford* (9th Cir. 2001) 275 F.3d 769, 773-778, reversed on another ground in *Woodford v. Garceau* (2003) 538 U.S. 202, 204-210), and that for nearly three centuries the judiciary had excluded propensity evidence as too probative (see *Evidence of Propensity and*

Probability in Sex Offense Cases and Other Cases (1994) 70 Chi.-Kent L.Rev. 15, 23, citing 1A Wigmore, Evidence in Trials at Common Law (3d ed. 1983) § 62.2; see also *People v. Alcala* (1984) 36 Cal.3d 604, 630-631, implicitly abrogated by statute as stated by *Falsetta*, *supra*, 21 Cal.4th at p. 911).

With commendable candor, Pérez acknowledges that he challenges the constitutionality of Evidence Code section 1109 to preserve the issue for federal review. In light of *Falsetta*'s rejection of like challenges to Evidence Code section 1108, the doctrine of stare decisis obliges us to reject his challenge to Evidence Code section 1109. (See *People v. Rucker* (2005) 126 Cal.App.4th 1107, 1120, citing *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

2. CALJIC No. 2.50.02

In *People v. Reliford* (2003) 29 Cal.4th 1007 (*Reliford*), the California Supreme Court rejected constitutional challenges to instruction with CALJIC No. 2.50.01 on evidence of other sexual offenses in a sexual offense prosecution. (*Reliford*, at pp. 1012-1013.) By analogy to *Reliford*, a Court of Appeal case has rejected a later constitutional challenge to instruction with CALJIC No. 2.50.02 on evidence of other domestic violence in a domestic violence prosecution. (See *People v. Pescador* (2004) 119 Cal.App.4th 252, 261-262; cf. *People v. Quintanilla* (2005) 132 Cal.App.4th 572, 578-579.) Counsel cite, and we are aware of, no case to the contrary.

First, Pérez argues that he was prejudiced by negative pregnant language in CALJIC No. 2.50.02 on proof of a domestic violence prior by a preponderance of the evidence and on proof of a charged crime beyond a reasonable doubt. The language he challenges stated that even if the jury were to "find by a preponderance of the evidence that the defendant committed a prior crime or crimes involving domestic violence, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged offenses." (CALJIC No. 2.50.02.) Immediately after so instructing, however, the court

clarified any ambiguity in that language by giving CALJIC No. 2.50.1: "If you find the *other crimes, or acts similar to the crimes were committed by a preponderance of the evidence*, you are nevertheless cautioned and reminded that *before a defendant can be found guilty of any crime charged, or any included crime in this trial the evidence as a whole must persuade you beyond a reasonable doubt* that the defendant is guilty of that crime." (Italics added.) Second, he argues that since the case against him was neither entirely nor substantially circumstantial he was prejudiced by a conflict between CALJIC No. 2.01 on proof of circumstantial evidence beyond a reasonable doubt and CALJIC No. 2.50.02 on proof of a domestic violence prior by a preponderance of the evidence and on proof of a charged crime beyond a reasonable doubt. That was a conflict that could only have helped, not impaired, his defense. (See *People v. Shea* (1995) 39 Cal.App.4th 1257, 1270-1271.) No harm, no foul.

Pérez acknowledges, again with commendable candor, that he challenges the constitutionality of CALJIC No. 2.50.02 to preserve the issue for federal review. In light of *Reliford*'s rejection of like challenges to CALJIC No. 2.50.01, the doctrine of stare decisis obliges us to reject his challenge to CALJIC No. 2.50.02. (Cf. *People v. Rucker, supra,* 126 Cal.App.4th at p. 1120, citing *Auto Equity Sales, Inc. v. Superior Court, supra,* 57 Cal.2d at p. 455.)

3. Aggravated Terms

Pérez's probation and sentencing hearing antedated *Cunningham v. California* (2007) 549 U.S. ___ [166 L.Ed.2d 856; 127 S.Ct. 856] (*Cunningham*), overruling *People v. Black* (2005) 35 Cal.4th 1238, vacated *sub nom. Black v. California* (2007) ___ U.S. ___ [167 L.Ed.2d 36, 127 S.Ct. 1210]). *Cunningham* held that California's determinate sentencing law violates the defendant's Sixth and Fourteenth Amendment right to a jury trial by permitting the imposition of an aggravated term on the basis of facts that a court finds true by a preponderance of the evidence instead of on the basis of facts that a jury

finds true beyond a reasonable doubt. (*Cunningham*, *supra*, at p. __ [166 L.Ed.2d at p. 864; 127 S.Ct. at p. 860].)

At Pérez's probation and sentencing hearing, the court found true three circumstances in aggravation – his "*numerous* prior convictions as an adult," his status as a parolee at the time of his commission of the crimes, and his unsatisfactory prior performance on probation or parole – and found true no circumstances in mitigation. (Italics added.) !(RT 607-609)! On that basis, without jury findings on circumstances in aggravation, the court selected the aggravated terms for both the corporal injury with a corporal injury prior and the criminal threats. (See former Cal. Rules of Court, rule 4.421(b)(2), (b)(4), (b)(5) (former rule 4.421(b))[2]; cf. former § 1170, subd. (b)[3].)

The authority for the court's finding that Pérez had "*numerous* prior convictions as an adult" is former rule 4.421(b)(2): "The defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are *numerous* or of increasing seriousness." (Italics added.) Yet "numerous" means "consisting of great numbers of units: existing in abundance: many, plentiful." (Webster's 3d New Internat. Dict. (1986) p. 1550.) The record shows that Pérez had *two* prior convictions as an adult, one for corporal injury, one for possession of a controlled substance, and that the court used the latter to impose the 1-year consecutive term for the prison term prior. As *Cunningham* noted, "A fact underlying an enhancement cannot do double duty" and "cannot be used to impose an upper term sentence and, on top of that, an enhanced term." (*Cunningham v.*

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[2] Applicable at the time of Pérez's sentencing was the version of the rule in effect until January 1, 2007.

[3] Applicable at the time of Pérez's sentencing was the version of the statute in effect until the post-*Cunningham* amendment that, inter alia, substituted "choice of the appropriate term shall rest within the sound discretion of the court" for "court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." (Stats. 2004, ch. 747, § 1; cf. Stats. 2007, ch. 3, § 3, effective March 30, 2007.)

California, supra, 549 U.S. at p. ___ [166 L.Ed.2d at p. 868; 127 S.Ct. at p. 863], citing former § 1170, subd. (b) ["The court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law."].) So the sole prior available to the court for the circumstance in aggravation in former rule 4.421(b)(2) was Pérez's *one* corporal injury prior, which was insufficient as a matter of law to establish that he had "*numerous* prior convictions as an adult." (Italics added.) !(RT 607)!

So we turn to the other two circumstances in aggravation. "*Other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt" (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*); italics added) because the "'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*" (*Blakely v. Washington* (2004) 542 U.S. 296, 303 (*Blakely*); italics in original). *Apprendi*'s "fact of a prior conviction" exception arose from the holding in *Almendarez-Torres v. United States* (1998) 523 U.S. 224 (*Almendarez-Torres*) that proof beyond a reasonable doubt is not necessary for a prior conviction. (*Id.* at pp. 239-247.)

The questions whether the other two circumstances in aggravation come within the *Apprendi* exception and whether a majority of the current United States Supreme Court regards *Almendarez-Torres* as good law, even though *Apprendi* expressly declined to overrule *Almendarez-Torres* (*Apprendi, supra,* at pp. 489-490), are not yet settled. (See, e.g., *People v. Govan* (2007) __ Cal.App.4th __, __-__ [2007 Cal. App. LEXIS 752, 18-40; 2007 WL 1413210, 6-13]; *People v. Guess* (2007) 150 Cal.App.4th 148, 163-167.) Here, however, those questions are not ripe. (See *Alameda County Land Use Assn. v. City of Hayward* (1995) 38 Cal.App.4th 1716, 1722, citing *California Water & Telephone Co. v. County of Los Angeles* (1967) 253 Cal.App.2d 16, 22; cf. *People v. Superior Court* (*Marks*) (1991) 1 Cal.4th 56, 65, fn. 6.) As a reviewing court, we are

loath to deny the sentencing court the exercise of the discretion that is intrinsically within the province of that court at a contested sentencing hearing. Accordingly we vacate the sentence in toto and remand for a new sentencing hearing to give that court the opportunity to structure an overall sentence in compliance with *Cunningham.*

DISPOSITION

The sentence is vacated in toto and the matter is remanded for a new sentencing hearing. Otherwise the judgment is affirmed.

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Gomes, J.

WE CONCUR:

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Vartabedian, Acting P.J.

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Cornell, J.